IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	)	
	)	Crim. No. 4:13-CR-00147
v.	)	
	)	
MO HAILONG and	)	
MO YUN,	)	
	)	
Defendants.	)	

GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION TO COMPEL PURSUANT TO AGREED PRETRIAL DEADLINES

Pursuant to the Agreed Pretrial Deadlines filed January 9, 2015 (Clerk's No. 168), the UNITED STATES OF AMERICA submits the following response to the portion of defendants' motion to compel (Clerk's No. 153) that seeks identification of all evidence acquired pursuant to FISA (the FISA information) and the application(s), order(s), and related materials (the FISA materials) authorizing such acquisitions, as well as additional information related to classified evidence.[1]

---

[1] Per agreed pretrial deadlines filed with the court on January 9, 2015, and approved by the court January 16, 2015, the government's obligation to respond to most aspects of defendants' motion to compel, Clerk's No. 153, be suspended until defendants have had an opportunity to review discovery produced through January 31, 2015.

The agreed pretrial deadlines also stated that by January 16, 2015, the government would respond to the section of defendants' motion to compel that seeks "that the government identify all documents and information obtained through means to which some measure of secrecy or classification is attached, such that defendants would not be, in the government's view, entitled to complete access to the legal authority and facts supporting the search. This includes but is not limited to identification of all information seized pursuant to FISA." This filing is that response.

[2] FISA information has been, is being, and will be turned over to the defense during the course of discovery. The government expects to complete such production by January 31, 2015.

Because neither the rules of criminal procedure nor FISA entitle defendants to identification of the FISA information or disclosure of the FISA materials at this point, because defendants already have sufficient information to move to suppress the FISA information, and because the court has not yet conducted the *ex parte*, *in camera* review required by FISA, the court should not order identification of the FISA information or disclosure of the FISA materials.

Defendants also appear to speculate about the existence of other "classified" or "secret" evidence in this case. With the exception of evidence obtained pursuant to FISA, neither the U.S. Attorney's Office nor the FBI personnel involved with this case are aware of any such evidence. Should the U.S. Attorney's Office or the FBI personnel involved with this case become aware of such evidence, the government will comply with its discovery obligations regarding such evidence, which may include filing(s) pursuant to the Classified Information Procedures Act (CIPA).

ARGUMENT

Specifically, defendants seek, "[a]s a predicate to motions pursuant to Federal Rule of Criminal Procedure 12, . . . a specific description of all evidence obtained by search and seizure and the legal authority permitting the search or seizure (e.g., federal search warrant under [FISA] . . .)," as well as "[a]pplications with supporting affidavits for court orders, and all court orders and all related filings, for any search or seizure conducted in this case." Clerk's No. 153-1 at 5; *see also* Clerk's No. 153 at 2-3. Because the government has provided (and continues to provide) defendants with notice and sufficient information[2] to file any necessary motions to suppress any information obtained or derived from electronic surveillance or physical searches pursuant to FISA, because there is no legal authority to require the government to compile a spreadsheet or list connecting individual pieces of evidence to particular authority to collect such evidence beyond what is clear on its face from the discovery material, because the underlying facts and the basis for any electronic surveillance or physical searches conducted pursuant to FISA remains classified, and because the court has not yet conducted the *ex parte*, *in camera* review required by FISA, the court should not grant this request.

Federal Rule of Criminal Procedure 12(b)(4)(B) provides in relevant part:

> [T]he defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

The purpose of this rule is to "provide the defendant with sufficient information to file the necessary suppression motions." *United States v. Lujan,* 530 F. Supp.2d 1224, 1246 (D. N.M. 2008), quoted in *United States v. Ishak*, 277 F.R.D. 156, 158 (E.D. Va. 2011). As noted by U.S. District Judge Ellis:

> Thus, the government's obligation under Rule 12(b)(4)(B) ends when it has made disclosures that sufficiently allow the defendants to make informed decisions whether to file one or more motions to suppress.

Ishak, 277 F.R.D. at 158.

---

[2] FISA information has been, is being, and will be turned over to the defense during the course of discovery. The government expects to complete such production by January 31, 2015.

No court has interpreted Rule 12(b)(4)(B) to require the government to do what the defense is asking in this case: to produce a list or spreadsheet linking each piece of evidence provided in discovery to the statutory or other legal authority justifying the government's collection of that information. In a traditional criminal case, defense counsel analyzes the discovery, determines what suppression motions to make, and files them. The government then responds.

The text of FISA's notice provisions provide for notice that the government intends to use or disclose in any trial, hearing, or other proceeding information obtained or derived from electronic surveillance or physical search pursuant to FISA. 50 U.S.C. §§ 1806(c), 1825(d).[3] Both defendants have received such notice. *See* Clerk's Nos. 42, 124. Nowhere does the statute entitle a defendant to a list of which item of evidence was obtained or derived from which authority. And given that there is no such requirement in the rules of criminal procedure, as discussed above, there is no basis for the Court to add such a requirement to the statute's text. The government has already provided, and continues to provide, defendants with sufficient information and notice to file any necessary motions to suppress.[4]

---

[3] FISA's notice requirements apply only to information that the government intends to use or disclose in a proceeding, which is, of course, a narrower category than information provided to the defense in discovery. Thus, FISA's notice provision has no application to material that is provided in discovery but that the government does not intend to use or disclose.

[4] Government counsel are not unmindful of the difficulties faced by defense counsel in this this case because they have received notice that some of the evidence contained in the discovery was obtained or derived under the authority of FISA. However, given the FISA notices filed and the discovery material provided and forthcoming, the government is in compliance with the requirements of Rule 12. *See, e.g., United States v. MacFarlane*, 759 F. Supp. 1163, 1170 (W.D. Pa. 1991) (provision of discovery which might be subject to suppression motions is sufficient).

Indeed, in the context of FISA collection, Congress has made a decision to allow for greater protection of information than is normally afforded, because of the need to protect sensitive national security information, including classified sources and methods. *See United States v. Belfield*, 692 F.2d 141, 148 (D.C. Cir. 1982). Congress intended that FISA "reconcile national intelligence and counterintelligence needs with constitutional principles in a way that is consistent with both national security and individual rights." S. Rep. No. 95-701, 95th Cong., 2d. Sess. 16 (1978). As such, in recognition of "the nature of the national interest implicated in matters involving a foreign power or its agents," Congress provided for more limited disclosure than is ordinarily provided with regard to criminal evidence. *Belfield*, 692 F.2d at 148.

Defendants' position that they are entitled to more information regarding FISA-authorized collection at this point is further refuted by the fact that Congress did provide for broader notice of FISA surveillance in certain situations, but declined to do so in the notice sections applicable to defendants. *See Dean v. United States*, 556 U.S. 568, 573 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). Specifically, Congress identified three scenarios where more specific notice regarding FISA surveillance was warranted. *See* 50 U.S.C. § 1825(b) (requiring notice identifying property seized, altered, or reproduced during physical search of a U.S. person's residence where the Attorney General has determined that there is no national security interest in continued secrecy); 50 U.S.C. § 1806(j) (notice of particular information regarding surveillance required where the Attorney General approves emergency surveillance and the government does not later obtain authorization from the Foreign Intelligence Surveillance Court); 50 U.S.C. § 1825(j) (notice of particular information regarding surveillance required where the Attorney General approves emergency physical search and the government does not later obtain authorization from the Foreign Intelligence Surveillance Court). Congress elected not to require such broad disclosure in the situation where a defendant is charged in a criminal proceeding. *See* 50 U.S.C. §§ 1806(c), 1825(d) (requiring only notice "that the government intends" to use or disclose FISA-obtained information).

Additionally, in that defendants seek disclosure of the FISA materials (i.e., application(s), order(s), and related materials authorizing such acquisitions), defendants' motion is premature because there is no basis at this time for the Court to make the findings that FISA requires to justify such disclosure. Classified information concerning such electronic surveillance or search is presumptively not discoverable, a presumption that can be tested only after compliance with FISA's judicial review procedures.

FISA prescribes the uniform process to be used by a district court in considering a defense motion to discover applications, orders, or other materials relating to electronic surveillance or physical searches under FISA, or a defense motion to suppress evidence acquired pursuant to or derived from such authorities.

50 U.S.C. §§ 1806(f) (electronic surveillance), 1825(g) (physical search). Following the Attorney General's filing of an affidavit,[5] these sections require that the Court first conduct *ex parte*, *in camera* review of the FISA materials to determine whether it can make an accurate determination of the legality of the electronic surveillance or physical searches without disclosure of the FISA materials to the defense. *Id.* Consequently, under FISA, the Court may not disclose any FISA application(s), order(s), or such other materials to the defense unless and until the Court has first concluded that it is unable to make an accurate determination of the legality of the FISA-authorized collection by reviewing the government's submissions (and any supplemental materials that the court may request) *in camera* and *ex parte*. 50 U.S.C. §§ 1806(f) (electronic surveillance), 1825(g) (physical search); *see also United States v. Daoud*, 755 F.3d 479, 481-82 (7th Cir. 2014); *United States v. El-Mezain*, 664 F.3d 467, 566 (5th Cir. 2011); *United States v. Abu-Jihaad*, 630 F.3d 102, 129 (2d Cir. 2010); *Belfield*, 692 F.2d at 147. If the district court is able to accurately determine the legality of the FISA-authorized collection based on its *in camera*, *ex parte* review of the materials the government submits, then the FISA statute prohibits disclosure of any of those materials to the defense, unless otherwise required by due process. 50 U.S.C. §§ 1806(f), 1825(g); *see also Daoud*, 755 F.3d at 481-82, 484; *El-Mezain*, 664 F.3d at 566; *United States v. Duggan*, 743 F.2d 59, 78 (2d Cir. 1984). In any event, disclosure of information relating to FISA electronic

[5] The government expects that such an affidavit will accompany the government's consolidated response to the defendants' motion to compel the disclosure of the FISA materials and the anticipated motion to suppress.

surveillance or physical search is inappropriate at this time, as the Court has not yet been provided with the materials necessary to conduct the statutorily required review.[6]

CONCLUSION

For these reasons, and based upon the entire record before the court, the court should deny defendants' request that the government identify the FISA information and disclose the FISA materials.

Respectfully Submitted,

Nicholas A. Klinefeldt
United States Attorney

By: */s/ Jason T. Griess*

Jason T. Griess
Marc Krickbaum
Assistant United States Attorneys
United States Courthouse Annex
110 East Court Avenue, Suite 286
Des Moines, Iowa 50309-2053
Tel: (515) 473-9300
Fax: (515) 473-9292
Email: Jason.Griess2@usdoj.gov

[6] The government will provide those materials to the court in its consolidated response to defendants' motion to compel and to defendants' expected motion to suppress the FISA information.

CERTIFICATE OF SERVICE

I hereby certify that on **1/16/15** I electronically filed the foregoing with the Clerk of Court using the CM ECF system. I hereby certify that a copy of this document was served on the parties or attorneys of record and the United States Probation Officer by:

____ U.S. Mail ____ Fax ____ Hand Delivery

_X_ ECF/Electronic filing ___ Other means (email)

UNITED STATES ATTORNEY

By: */s/ddegraff*
Supervisory paralegal